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No. 82-1684

IN THE

Supreme Court of the United States

October Term, 1983

RAYMOND J. DONOVAN, SECRETARY OF LABOR, ET AL., APPELLANTS

v.

LONE STEER, INC., APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA

BRIEF OF THE NATIONAL RESTAURANT ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE POSITION OF APPELLEE

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QUESTION PRESENTED

Whether Appellants violate the Fourth Amendment to the United States Constitution when they rely upon the warrantless, on-site investigation and inspection provisions of Section 11 of the Fair Labor Standards Act, 29 U.S.C. §211, to gain entry, over objection, to an employer's place of business for the purpose of conducting an investigation and inspection of the employer's premises and records.

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BRIEF OF THE NATIONAL RESTAURANT ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE POSITION OF APPELLEE

This brief *amicus curiae* is filed by the National Restaurant Association with the consent of all parties, as provided for in Rule 36.2 of the Rules of this Court. Letters consenting to the filing of this brief have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

The National Restaurant Association is a national membership association of foodservice operators. Since the Association's membership comprises approximately

one-fifth of the 560,500 foodservice establishments in the United States, the National Restaurant Association is a principal spokesman for the industry.

Restaurateurs have become concerned over the years with the random and arbitrary nature of Department of Labor inspections under the Fair Labor Standards Act. Frequently these inspections are unannounced and, generally, they are on-site inspections. Many of these inspections are disruptive of business operations and are conducted without any employee complaint or other indication that an FLSA violation has occurred. There currently exists considerable confusion among restaurateurs concerning their rights in connection with such inspections and the Court's decision in this case will help to define the limits of the Labor Department's authority in the conduct of these investigations. Thus, the Association submits this *amicus curiae* brief because the Court's decision in this matter will have a significant effect on the foodservice industry.

STATEMENT OF THE CASE

On January 6, 1982, Al Godes, a compliance officer with the Wage and Hour Division of the United States Department of Labor, telephoned Lone Steer, Inc., Appellee, a motel-restaurant located in Steele, North Dakota ("Lone Steer"). Mr. Godes informed Lone Steer's Manager, Susanne White, that he would be at the employer's establishment at 9:00 a.m. the following morning to conduct an investigation of the establishment. The investigation was to be conducted pursuant to the authority provided in Section 11 of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §211, and its purpose was to determine whether Lone Steer was in compliance with

the FLSA. Ms. White was to have available and produce for his investigation, the time, wage and payroll records for all employees for the last two years (J.A. 12). Mr. Godes did not request the employer's permission to engage in this on-site investigation, nor did he state that he had, nor did he have, any warrant authorizing the entry and inspection in question (J.A. 12). Ms. White telephoned Mr. Godes later that day and informed him that it was not convenient for Mr. Godes to conduct the investigation the following morning (J.A. 12).

The next day, January 7, 1982, Mr. Godes sent Ms. White a letter informing her that he would commence his investigation at 9:00 a.m. on January 14, 1982 at Lone Steer premises (J.A. 12-13). After learning of Mr. Godes' intention to conduct this on-site investigation of Lone Steer, Ms. White contacted Lone Steer's attorney, Mr. Richard G. Peterson. On January 12, 1982, attorney Peterson wrote Mr. Godes requesting information regarding the scope of the demanded investigation and inquiring whether the investigation was prompted by any complaint having been filed against Lone Steer. In that letter attorney Peterson specifically denied permission to conduct the investigation at Lone Steer premises until the matters of the scope and rationale of the investigation were resolved (J.A. 13).

Mr. Godes forwarded attorney Peterson's letter of January 12, 1982 to the Regional Office of the Wage and Hour Division in Denver, Colorado (J.A. 14). By letter dated January 20, 1982, Loren E. Gilbert, the Assistant Regional Administrator for the Wage and Hour Division, responded to Mr. Peterson's letter of January 12, 1982 (J.A. 14, 23). Mr. Gilbert refused to reveal how or why Lone Steer was chosen for this investigation. Mr. Gilbert refused to reveal whether the investigation was initiated

by reason of a filed complaint and specifically declined to disclose the "motive" for the investigation (J.A. 14, 23).

Mr. Gilbert's position in his January 20, 1982 letter is consistent with the United States Department of Labor's official policy on the matter as published in Appellants' Field Operations Handbook ("FOH").[1] It is the Department's published position that the Wage and Hour Division's investigative authority is not dependent upon the existence of a filed complaint. Specifically, Chapter 52 of the FOH deals with the selection of establishments to be investigated and, except for special circumstances, places this responsibility on the area offices of the Wage and Hour Division, functioning through the local compliance officers. Chapter 52, Section 52a00(b) provides that:

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1. Appellants' Field Operations Handbook is described in its Chapter 100, Section 100a00(a) as follows:

> The FOH is the basic manual for direction and guidance of Wage-Hour personnel in the uniform and proper administration and enforcement of the Acts administered by Wage-Hour. It sets forth the official USDOL interpretation and position on various aspects of these Acts, and provides the operating policies and procedures to be followed in the conduct and disposition of investigations carried out under the administered laws.

Appellants' official policy regarding the nondisclosure of the rationale for an investigation is contained in Chapter 52, Section 52d00 of the FOH as follows:

> The CO shall take no action which would reveal the existence of a complaint or disclose the identity of a complainant. As a matter of policy, WH (Wage-Hour Division) does not disclose the reasons for an investigation. Where inquiry is made concerning the reasons for an investigation, the inquirer shall be told that investigations are made for a variety of reasons . . .

> The CO (compliance officer) *must* develop a "feel" for establishments likely to be in substantial violation and submit these as leads; he *must* be constantly receptive to complaints. No AD (Area Director) or CO can be content to wait for valid complaints or good leads to turn up in his area: they must participate actively in seeking them out. The most important part of the investigative process lies in determining *in advance* which establishments most *need* to be investigated and scheduling these for investigation . . .(Emphasis in original.)

The degree of investigative discretion of the local Wage and Hour officials is further reflected by the following "general consideration" set forth in Chapter 52, Section 52a00(a):

> The key is flexibility to do what makes sense in a given situation, the authority to make judgments as to what is essential to a sound investigation and what is not, and the acceptance of the responsibility for the judgments made. Factors basic to effective enforcement by investigation may be stated as follows:
>
> (1) Which establishments shall be investigated?

Notwithstanding Lone Steer's written objection to Appellants' investigation, Mr. Gilbert instructed compliance officer Godes to initiate the described investigation on February 2, 1982 at 10:30 a.m. *at Lone Steer's offices* in Steele, North Dakota (J.A. 14, 23). Mr. Gilbert informed Lone Steer's attorney of this in his letter to Peterson of January 20, 1982, and Gilbert specifically directed Mr. Peterson to Section 11 of the FLSA regarding the Secretary's investigative authority (J.A. 14, 23).[2]

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2. It is Section 11(a) of the FLSA which purports to authorize the Secretary of Labor to conduct investiga-

Mr. Gilbert's direction of Mr. Peterson to Section 11 of the FLSA was also consistent with official, published Department of Labor policy. Specifically, Chapter 52, Section 52a05(a) of the FOH deals with employer refusals to permit an on-site investigation and provides in relevant part:

> If an employer refuses to permit an investigation, his attention shall be directed to Secs 9 and 11(a) of the FLSA . . . and he shall be reminded that his refusal may result in the issuance of a subpoena or other court process. If permission to investigate is still refused, the CO shall take no further action and shall refer the matter promptly to the AD (Area Director).[3]

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tions and specifically authorizes the Secretary to "enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices or matters as he may deem necessary or appropriate . . ."

3. This practice of referring a reluctant employer to the inspection provisions of Section 11 is also mandated by FOH Chapter 86, Section 86b00(a). In addition, this technique is repeated at a higher administrative level if the employer persists in refusing an on-site inspection. Chapter 86, Section 86b00(c) of the FOH instructs the Wage and Hour Area Director to contact such an employer, attempt to persuade him to permit the desired inspection, and once again to direct his attention to the Division's statutory inspection authority. Specifically, Section 86b00(c) provides as follows:

> If a letter is sent to the employer, it shall review the AD's understanding of the events surrounding the employer's refusal to permit access to the firm's records, and shall indicate the scope of the Division's investigatory powers as set out in FLSA Secs 9 and 11(a), and shall request the employer to reconsider the refusal.

Finally, after directing attorney Peterson's attention to the language of Section 11 of the Act, Gilbert requested that he be notified if the employer was going to continue to prohibit the February 2, 1982 investigation at Lone Steer premises, so that he might request an administrative subpoena to conduct the investigation (J.A. 14, 23). Beyond Mr. Gilbert's general description of the scope of the investigation and his statement that it was to take place "at Lone Steer's offices in Steele, North Dakota", Mr. Gilbert provided no information regarding who or what would be subpoenaed (or where the subpoena would be returnable) in the event of further employer resistence. (J.A. 14, 23)

By letter dated January 28, 1982, Lone Steer attorney Peterson responded to the January 20, 1982 letter of Mr. Gilbert. Attorney Peterson again objected to the "non-consensual, warrantless investigation at the Lone Steer Cafe/Motel" scheduled for February 2, 1982, which Gilbert directed to take place over Peterson's earlier objection. Attorney Peterson specifically referred Mr. Gilbert to the decision of this Court in *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) and, in reliance upon *Barlow's*, again informed Mr. Gilbert that Lone Steer would not submit to the demanded investigation without a valid search warrant from an independent magistrate.[4]

On February 1, 1982, faced with the threat of a February 2, 1982 non-consensual investigation and inspection at Lone Steer's place of business—purportedly au-

4. Peterson's January 28, 1982 letter to Mr. Gilbert was attached as Exhibit "H" to Plaintiff's Memorandum Brief In Support Of Temporary Restraining Order, filed February 1, 1982 in Civil Action No. A1-82-10. (*see also* J.A. 14-15).

thorized under Section 11 of the FLSA—Lone Steer filed suit against Appellants at Civil Action No. A1-82-10 in the United States District Court for the Northern District of North Dakota (J.A. 1). In that action, Lone Steer sought a temporary restraining order, preliminary injunction and permanent injunction preventing Appellants from entering Lone Steer's premises and from seizing any of Lone Steer's property without obtaining a valid search warrant from an independent magistrate (J.A. 22). Lone Steer also alleged that the threatened investigation "pursuant to Section 11 of the Fair Labor Standards Act (29 U.S.C. §211) constitutes an unlawful search and seizure in violation of the Fourth Amendment of the United States Constitution" (J.A. 21). Consequently, Lone Steer requested a declaratory judgment that such non-consensual inspections were unconstitutional (J.A. 22).

The following day, February 2, 1982, Mr. Godes, accompanied by Mr. Gerald Hill, Assistant Area Director of the Denver, Colorado office of the Wage and Hour Division, entered the Lone Steer facility in Steele, North Dakota to attempt to conduct the objected to, on-site investigation (J.A. 15). The manager of Lone Steer did not appear or produce any records. At that point, Mr. Godes served a subpoena on an employee of Lone Steer (J.A. 15). The subpoena directed an officer, agent or employee of Lone Steer having custody and personal knowledge of Lone Steer's records to appear before Mr. Godes at the Wage-Hour Office in Bismarck, North Dakota on February 9, 1982, "to testify regarding the wages, hours, and other conditions and practices of employment maintained by Lone Steer, Inc." (J.A. 15, 25). The subpoena also required the production of certain payroll, time and personnel records pertaining to each employee over the past three years, together with certain specified sales

information covering a three-year period (J.A. 15-16, 25-26).

In light of the pending injunction/declaratory judgment action, Lone Steer's attorney contacted counsel for the Department of Labor in Denver and objected to the Department of Labor's investigation procedure of issuing this administrative subpoena after repeated efforts to force a Section 11, on-site investigation of Lone Steer (J.A. 16-17). Mr. Peterson informed counsel for the United States Department of Labor that Lone Steer would not respond to the subpoena [5] (J.A. 16).

On March 3, 1983, the Secretary of Labor initiated its own action in the district court, at Civil Action No. A1-82-24, to compel Lone Steer to comply with the administrative subpoena (J.A. 7). The district court subsequently consolidated Lone Steer's injunction and declaratory judgment action with the Secretary's enforcement action (J.A. 7-8).

Both Lone Steer and Appellants filed Motions for Summary Judgment upon a stipulation of facts (J.A. 4, 8). In an opinion signed October 27, 1982 (J.S. App. 1a-8a), the district court concluded that:

> The Secretary's argument that *Barlow's* does not apply to Section 11 investigations is untenable. It is reasonable to conclude that the exigencies of an entry upon commercial premises for the purpose of conducting a safety and health inspection designed

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5. Subsequent to the service of the subpoena upon Lone Steer, Appellee amended and expanded its earlier filed complaint in Civil Action No. A1-82-10 to recite the Department's subsequent conduct of issuing a subpoena after entry to inspect had been denied (J.A. 2, 21).

to protect the personal well-being of employees supply more compelling bases for proceeding without a warrant than the circumstances presented here, where entry is sought for the purpose of determining compliance with wage and hour regulations. The reasoning of the Supreme Court in *Barlow's* applies with equal—if not greater—force in the instant situation.

Consequently, the district court granted summary judgment in favor of Lone Steer and against Appellants in both Civil Action Nos. A1-82-10 and A1-82-24 (J.A. 4, 8). On October 28, 1982, the district court entered identical orders in both actions ordering that "the Secretary of Labor may not proceed to enter upon the premises of Lone Steer, Inc., for the purpose of inspecting its records under Section 11 of the Fair Labor Standards Act, without first having obtained a valid warrant . . . " (J.A. 4, 8).

On November 8, 1982, the Secretary of Labor filed a Motion To Alter Or Amend Judgment requesting that the judgments in both Civil Action Nos. A1-82-10 and A1-82-24 be amended to order compliance by Lone Steer with the subpoena of the Department of Labor (J.A. 5, 9, J.S. App. 15a-17a). This Motion was denied by the district court on November 24, 1982 (J.A. 5, 9).

By separate Notices of Appeal dated December 15, 1982, Appellants appealed both the October 28, 1982 Judgment of the district court in Civil Action No. A1-82-10 and the October 28, 1982 Judgment of the district court in Civil Action No. A1-82-24 (J.A. 5, 9).

SUMMARY OF ARGUMENT

Section 11(a) of the Fair Labor Standards Act purports to authorize the warrantless entry of an employer's premises by representatives of the Secretary of Labor for the purpose of questioning employees, inspecting the premises, inspecting and transcribing documents and investigating "such facts, conditions, practices or matters as he may deem necessary or appropriate" to determine whether any person has violated any provision of the FLSA.

In 1978, however, this Court held in *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), that the federal statute there involved (*i.e.*, the Occupational Safety and Health Act of 1970, 29 U.S.C. §657(a)) was unconstitutional insofar as it purported to authorize nonconsensual inspections of an employer's premises and records without a warrant or its equivalent. In so holding, this Court not only reaffirmed the proposition that the Warrant Clause of the Fourth Amendment protects commercial buildings as well as private homes, but also reaffirmed its prior holding that warrantless searches of commercial premises, as well as homes, are presumptively unreasonable. *Camara v. Municipal Court*, 387 U.S. 523 (1967).

As the district court here concluded, the reasoning of this Court in *Barlow's* applies with equal—if not greater—force to the present case. As in *Barlow's*, the present case does not fall within the narrow "pervasively regulated business" exception to the warrant requirement. Moreover, as the district court noted, if the exigencies of an entry upon commercial premises to conduct a health inspection designed to protect the personal well-being of employees were held insufficient to justify a warrantless inspection, as in *Barlow's*, there exists significantly less

justification for Section 11's warrantless inspection provisions where entry is sought solely to determine compliance with wage and hour laws. The Department of Labor's compliance with the warrant requirement in the present case would present no serious burden to its investigation scheme. Here, as in *Barlow's*, the protections afforded the employer's privacy by a warrant are significant, especially in light of the Department of Labor's broad authority under Section 11 to demand entry, without explanation, at any time. Here, as in *Barlow's*, the authority to make warrantless searches devolves almost unbridled discretion upon government officers, particularly those in the field, as to when, whom and what to search.

Notwithstanding the clear applicability of *Barlow's* to the warrantless inspection and investigation provision of Section 11 of the FLSA, Appellants here—pursuant to Section 11—sought to conduct an on-site investigation of Lone Steer, Inc. over Lone Steer's repeated objections. Appellants did not serve the administrative subpoena demanding the off-site production of records and testimony, until after repeated efforts to conduct such an on-site inspection over Lone Steer's objection had failed. Indeed, Appellants did not serve the subpoena until after Lone Steer initiated court action seeking to enjoin such warrantless, on-site inspections and seeking a judgment declaring Section 11's warrantless inspection provisions unconstitutional. Appellants' characterization of this controversy as a "simple administrative subpoena" case ignores the history of this dispute, and is erroneous.

Indeed, Appellants actually have "institutionalized" this deprivation of Fourth Amendment rights through the promulgation and implementation of official policy. Specifically, when a Wage and Hour official faces em-

ployer opposition to a demanded on-site inspection, the official is directed, by published Government policy, to specifically direct the employer's attention to the warrantless entry and inspection provisions of Section 11(a) of the Act. This policy was followed in the present case.

In light of the clear applicability of this Court's holding in *Barlow's* to the warrantless inspection provisions of Section 11 of the FLSA, it is improper for the Appellants to regularly rely upon that Section to force entry into business premises over objection. Further, the Government compounds the impropriety of its reliance upon Section 11 by its policy and conduct of specifically directing employers to that Section's warrantless entry and inspection provisions when employer resistence to an on-site inspection is encountered. This official conduct is intentionally misleading and is calculated to obtain a form of coerced "consent" to the demanded on-site investigation in deprivation of the employer's constitutional rights.

This routinized deprivation of constitutional rights through Appellant's enforcement policy should end. It is respectfully submitted that the Court should hold that Section 11 of the FLSA is unconstitutional insofar as it purports to authorize non-consensual on-site inspections without a warrant or its equivalent. The judgments of the district court should be affirmed.

ARGUMENT

I. The Warrantless Entry And Inspection Provisions Of FLSA Section 11 Violate The Fourth Amendment.

This Court, in *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), held that the entry and inspection provisions of the Occupational Safety and Health Act of 1970 (29 U.S.C. §657(a)) were unconstitutional insofar as they purported to authorize nonconsensual inspections of an employer's premises and records without a warrant or its equivalent. The OSHA provision before the Court in *Barlow's* purported to allow agents of the Secretary of Labor to "enter without delay any . . . workplace" and to "inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment . . . and to question privately any such employer, owner, operator, agent or employee."

In holding this warrantless entry and inspection provision unconstitutional, this Court, relying upon its previous holdings in *Camara v. Municipal Court*, 387 U.S. 523 (1967) and *See v. City of Seattle*, 387 U.S. 541 (1967), first reaffirmed the principle that a

> businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violations of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant.

436 U.S. at 312, quoting *See v. City of Seattle*, 387 U.S. at 543.

In applying this basic principle, the Court in *Barlow's* held that the Fourth Amendment requires a warrant or its equivalent before an OSHA inspector may enter and inspect an employer's premises without consent. In reaching this conclusion, the Court reasoned that the potential invasion of an employer's privacy interests, made possible by OSHA's broad inspection authority, was significant enough to require the protection of a warrant. The Court reasoned that OSHA's entry and inspection provision was so far-reaching as to "devolve [] almost unbridled discretion upon executive and administrative officers particularly those in the field, as to when to search and whom to search." 436 U.S. at 323. According to the Court, such wide administrative discretion is constitutionally impermissible, requiring a warrant to "provide assurances from a neutral officer that the inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria." *Id.*

This Court, in the *Barlow's* case, rejected the Government's contention that warrantless inspections were essential to the OSHA enforcement scheme. While recognizing the exigencies of OSHA inspections designed to protect the health and safety of employees, the Court nevertheless concluded that the requirement of a warrant would not so impede the Government's enforcement efforts as to outweigh the employer's Fourth Amendment right to privacy in his commercial property. Noting that the Secretary's regulations themselves contemplated the possibility of an employer's refusal to permit an inspection, and provided for resort to compulsory process to compel an inspection in such cases, the Court reasoned that the slight delay necessary to obtain a warrant would not significantly reduce the efficiency of the enforcement process.

As the district court in this case recognized, the warrantless entry and inspection procedures authorized by Section 11 of the FLSA are virtually indistinguishable from those held unconstitutional in *Barlow's*. The reasoning of *Barlow's* applies with equal, if not greater, force in the FLSA context. To begin with, Section 11(a) of the FLSA provides a broad warrantless entry and inspection authority similar to that provided by OSHA. Under Section 11(a), the Secretary of Labor is specifically authorized to "enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices or matters as he may deem necessary or appropriate."

Section 11, on its face, purports to provide a warrantless entry and inspection authority as broad as that held unconstitutional in *Barlow's*. The breadth of this authority, and the consequent discretion permitted administrative officers, is borne out by the Government's official policy as set forth in its Field Operations Handbook ("FOH"). Chapter 52, Section 52a00 (b) of the FOH indicates the wide investigative discretion of officers in the field, as it gives these officers the responsibility of developing investigative leads, and of "determining *in advance* which establishments most *need* to be investigated and scheduling these for investigation . . ." (emphasis in original). Chapter 52, Section 52a00 (a) of the FOH further reflects the degree of investigative discretion of Wage and Hour compliance officers when it stresses the necessity of "flexibility to do what makes sense in a given situation, the authority to make judgments as to what is essential to a sound investigation," and the responsibility to weigh various factors to determine "[w]hich establishments shall be investigated."

Thus, the language of FLSA Section 11, as well as the Government's official policy in implementing the investigatory authority provided by that Section, demonstrate clearly that the concerns expressed by this Court in *Barlow's* are fully applicable to FLSA investigations. The Government's inspection system contains the same glaring defect that prompted this Court in *Barlow's* to impose a warrant requirement: it confers "unbridled discretion upon executive and administrative officers particularly those in the field, as to when to search and whom to search." 436 U.S. at 323.

Here, as in *Barlow's*, the Government's argument that its enforcement efforts will be unduly impeded by the requirement of obtaining a warrant, is unfounded. Indeed, as the district court pointed out, there is a less urgent need for immediate on-site inspections in the FLSA context—where the focus of the inspection is on wage and hour records—than in the OSHA setting where immediate inspections may be necessary to protect the health and safety of employees. Under these circumstances, the employer's right to be free from warrantless searches, permitted at any time and without explanation at the discretion of the compliance officer, far outweighs the Government's interest in immediate entry. Based on the facts and the reasoning of *Barlow's*, this Court should uphold the district court's decision that the warrantless inspection provisions of the FLSA are constitutionally impermissible under the Fourth Amendment.

II. The Government's Characterization Of This Case As A "Simple Subpoena Case" Is Misleading And Erroneous.

The Government urges this Court to decide this appeal on the basis of precedent upholding the constitutionality of administrative subpoenas issued to compel

the production of required records without probable cause. Contending that it has not sought entry into Lone Steer's business premises for the purpose of conducting an investigation under FLSA Section 11, the Government argues that the only means used to compel production of these records was the subpoena returnable at the Department of Labor's offices.

However, both the facts and the procedural posture of this case bely the Government's contention that nothing more than the simple subpoena of records is at issue here.[6] As the stipulated facts demonstrate, agents of the Department of Labor sought repeatedly to obtain forced entry into Lone Steer's business premises, over Lone Steer's objection (J.A. 12-15). The Government's efforts to obtain an on-site inspection of records were made in express reliance upon its purported authority to "enter and inspect" under Section 11 of the FLSA (J.A. 14, 23). The Government's continued reliance upon Section 11 to

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6. In its Brief, the Government asserts that "no government official made any attempt to enter appellee's private premises when consent to enter was refused. The only means used to compel production of the documents was the subpoena duces tecum returnable at the Department of Labor's offices." (Brief for the Appellants at 19 n. 11). This contention is erroneous. As the stipulated facts clearly demonstrate, compliance officer Godes twice demanded entry to conduct an inspection at Lone Steer's place of business before referring Lone Steer's objections to Mr. Gilbert (J.A. 12-13). Mr. Gilbert then relied expressly upon Section 11 in his letter to Lone Steer's attorney, in a continued effort to obtain an on-site inspection. Before serving the administrative subpoena, Mr. Godes was instructed to make a final attempt, on February 2, 1982, to conduct an on-site investigation of Lone Steer. Indeed, this final effort was made *after* Lone Steer had filed its action seeking to enjoin the Government's attempts at forced entry. (J.A. 14-15, 1).

attempt to gain entry, notwithstanding this Court's holding in *Barlow's*, was highly improper.

When Lone Steer resisted the Government's demands, the Division responded by a letter expressly asserting its authority to conduct an on-site inspection under FLSA Section 11 and again directed the compliance officer to appear at Lone Steer premises to commence the investigation (J.A. 14, 23).[7] It was only after Lone Steer filed suit challenging the Government's asserted authority to conduct an entry inspection under Section 11 that the Division withdrew its demands and resorted to the use of an administrative subpoena. In fact, the subpoena was not served until after Lone Steer had filed its action in district court challenging the Division's right to implement Section 11's warrantless inspection provisions (J.A. 15, 1).[8]

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7. While it is true that this letter (i.e., Mr. Gilbert's January 20, 1982 letter to Lone Steer attorney Peterson) referred to a potential subpoena request, this subpoena reference was quite vague. The subpoena referred to by Mr. Gilbert was supposed to enable compliance officer Godes to conduct "the investigation," which Gilbert specifically described in his letter as to take place at Lone Steer offices and to involve record review, record transcription, and employee interviews (J.A. 14, 23). There certainly was no effort in this letter to inform the employer that, in light of its objection to an on-site investigation, the Government would readily agree to an off-site review limited to certain documents required by law to be maintained.

8. After the Government filed its subpoena enforcement action in this case, the district court consolidated that action with Lone Steer's earlier filed injunction/declaratory judgment action (J.A. 3-4, 7-8), and judgments in Lone Steer's favor were entered in both civil actions in

Even more significant is the fact that the Government's conduct in this case is entirely consistent with its official policy as set forth in its Field Operations Handbook ("FOH"). As shown by the various portions of the FOH discussed *supra*, the Government has adopted a deliberate, official pattern of conduct involving reliance upon Section 11 to obtain entry into an employer's premises to conduct on-site investigations. Notwithstanding this Court's decision in *Barlow's*, the Department of Labor continues to adhere to its standard operating procedure in implementing the warrantless entry and inspection provisions of FLSA Section 11. This institutionalized procedure, as evidenced by the FOH,

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this case (J.A. 4, 8). When the Government sought this Court's review, it filed separate notices of appeal in *both* actions (J.A. 5, 9). Thus, the issues raised by Lone Steer in its complaint and disposed of by the district court in its opinion are squarely before this Court for decision.

In an appeal brought pursuant to 28 U.S.C. §1252, as is the present appeal, the scope of review by this Court extends to every question in the case, even including matters not addressed by the court below. SEE C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION §4037 (1978). *See also U.S. v. Raines*, 362 U.S. 17, 27 n. 7 (1960), in which this Court explained its scope of review under Section 1252 as follows:

> In view of the broad nature of §1252, which seems to indicate a desire of Congress that the whole case come up, . . . we have the power to pass on these other questions, and since the District Court expressed its views on most of them, we also deem it appropriate to do so.

constitutes a deliberate pattern of deprivation of Fourth Amendment rights.[9]

Specifically, when a Wage and Hour official faces employer opposition to a demanded on-site inspection, the official is directed, by Chapters 52 and 86, Sections 52a05 (a) and 86b00 (a) of the OFH, to specifically direct the employer's attention to the warrantless entry and inspection provisions of FLSA Section 11(a).[10] If the employer persists in refusing to permit the demanded entry,

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9. As discussed more fully below, the Division's standard operating procedure includes express reliance upon Section 11's authority to counter any employer resistance to such inspections. This continuing official policy reinforces the conclusion that Lone Steer's request for declaratory relief was, and is, a live issue in need of decision. As this Court explained in *U.S. v. W. T. Grant Co.*, 345 U.S. 629 (1953), a defendant who has discontinued challenged activities can convince the Court that the controversy is no longer ripe for decision only if he satisfies the heavy burden of showing there is no reasonable expectation that the wrong will be repeated. *See also U.S. v. Oregon State Med. Soc.*, 343 U.S. 326, 333 (1952) ("when defendants are shown to have settled into a continuing practice [of unlawful conduct] . . . , courts will not assume that it has been abandoned without clear proof . . . It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption.") In the present case, just such a probability of resumption is demonstrated by Appellants' continuing policy of reliance upon Section 11's authority to enforce on-site inspections over the objections of reluctant employers. In light of this Court's decision in *Barlow's*, the Government's adherence to such an investigation system should not be permitted to continue.

10. *See* provisions of FOH Chapters 52 and 86, Sections 52a05(a) and 86b00(a), *supra* at page 6.

the compliance officer's superior again is directed by published Governmental policy, to request the employer to reconsider his refusal, and to remind him of the Government's purported authority to conduct on-site inspections pursuant to FLSA Section 11. This precise policy was followed in the present case (J.A. 14, 23).

Thus, not only has the Government adopted an official policy of regular reliance upon the warrantless inspection provisions of FLSA Section 11 to obtain entry into business premises, but also—as its standard procedure—it has made a practice of specifically directing employers to that Section when any resistance is encountered. This regular course of conduct, in light of the clear applicability of this Court's holding in *Barlow's* to the warrantless inspection provisions of the FLSA, is an institutionalized deprivation of Fourth Amendment rights. Such a policy should not be permitted to continue.

III. The Government's Investigation Technique Of Responding To Employer Resistance To On-Site Investigations By Directing The Employer To FLSA Section 11 Is Misleading And Calculated To Obtained A Coerced Consent To Such Investigations.

As Chapters 52 and 86, Sections 52a05 (a) and 86b00(a) and (c) of the Field Operations Handbook indicate, a deliberate pattern of reliance upon Section 11 has been established by the Government. This pattern, already improper in light of *Barlow's*, is compounded by the Government's misleading references to Section 11 in an effort to persuade reluctant employers to permit entry. Each and every time a compliance officer encounters employer resistance to his demand for entry, he is instructed by these Sections of the FOH to counter that resistance by directing the employer's attention to the

Government's purported authority to obtain entry under Section 11. This practice is misleading to the employer, who is usually a layman, and is calculated to obtain "consent" to conduct an entry inspection under color of purported statutory authority to do so.

This Court has made it quite clear that acquiescence to a false or invalid claim of authority to conduct a search does not constitute genuine consent under the Fourth Amendment. The leading case in this area is *Bumper v. North Carolina*, 391 U.S. 543 (1968), in which police officers obtained "consent" to search after asserting that they possessed a valid warrant. This Court held that no valid consent had been obtained, because the officers were admitted only after asserting that they had lawful authority to enter. According to the Court, the burden of proving voluntary consent to a search

> cannot be discharged by showing no more than acquiescence to a claim of lawful authority. A search conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid. . . . When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent.

391 U.S. at 548-50.

Recognizing that a law enforcement official may exercise this type of improper coercion in a variety of ways, the Court of Appeals for the District of Columbia Circuit has applied the reasoning of *Bumper* to invalidate a seizure of records obtained under threat of a statutory penalty. In *Jones v. Unknown Agents of Federal Election*

Commission, 613 F.2d 864 (D.C. Cir. 1979), *cert. denied* 444 U.S. 1074 (1980), a law enforcement official obtained "consent" to inspect plaintiff's financial records by informing him that he would incur criminal penalties if he refused to produce the documents. The court held that the plaintiff's "consent" was coerced and therefore invalid because the agent's threat of statutory sanctions was, in effect, an announcement that the plaintiff had no right to resist the seizure of the documents in question.

Although the Government in the present case has not attempted to obtain entry by asserting the existence of a valid warrant or by threat of penalty, its institutionalized policy of express reliance upon FLSA Section 11 is no less coercive. The reasoning of *Bumper* should be applied with equal force to the practice of obtaining "consent" based upon invalid statutory authority to enter and inspect. A police officer with a purportedly valid search warrant clearly wields a high degree of colorably lawful coercion. However, any layman specifically directed to the language contained in Section 11 of the FLSA also would obtain a clear message that he had no right to resist the on-site investigation. At the least, this official conduct is highly misleading to the employer, and is calculated to obtain an imperfect "consent" to an on-site inspection in deprivation of the employer's constitutional rights.

In sum, the Government's conduct of brandishing, in the face of employer objection, unconstitutional statutory authority in order to achieve consent to a search, not otherwise permissible without a warrant, should not be permitted to continue.

CONCLUSION

For these reasons, this Court should affirm the judgments of the district court and its underlying holding that the warrantless entry and inspection provisions of the FLSA Section 11 violate the Fourth Amendment to the United States Constitution.

Respectfully submitted,

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